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IN THE

Supreme Court of the United States

October Term, 1953

No. 148

JOSEPH SICA,

Defendant and Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION TWO THEREOF,

Appellees.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two, and Brief in Support Thereof.

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SUBJECT INDEX

PAGE

Petition for writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two 1

Opinions below 2

Jurisdiction 3

Questions presented 4

Statutes involved 5

Summary statement of the matters involved 6

Reasons relied upon for the allowance of the writ 8

Conclusion 12

Brief in support of petition for writ of certiorari 13

Preliminary statement 13

Specifications of error 14

Argument 15

Conclusion 21

TABLE OF AUTHORITIES CITED

CASES	PAGE
Albori, In re, 95 Cal. App. 42, 272 Pac. 321	16
City of Tulare v. Hevren, 126 Cal. 226	9, 10
Dartmouth College case, 4 Wheat. 581	17
De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345	10
Duncan, In re, 139 U. S. 449, 35 L. Ed. 219	9
Edelman v. California, 97 L. Ed. 227	16
Gay v. Thorpe, 1 Cal. App. 312, 82 Pac. 221	16
Holden v. Hardy, 169 U. S. 366	10
Jessup, In re, 81 Cal. 408, 22 Pac. 742	10
McClintock v. Abel, 68 P. 2d 273, 21 Cal. App. 2d 11	9
Morgan v. United States, 304 U. S. 1	17
Pacific Telephone Company v. Eshleman, 166 Cal. 640, 137 Pac. 1119	16
Palko v. Connecticut, 302 U. S. 319	10, 11
People v. Superior Court, 28 Cal. App. 2d 442, 82 P. 2d 718	18
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158	17
Railroad Commission v. Pacific Gas & Electric Company, 302 U. S. 388	17

STATUTES	
California Constitution, Art. VI, Sec. 1	9
California Penal Code, Sec. 1237, Sub. 3	4, 5, 16
California Penal Code, Sec. 1265	4, 5, 11, 14, 15, 16, 17
United States Constitution, Fifth Amendment	15
United States Constitution, Fourteenth Amendment	17

TEXTBOOK	
Brannon, Fourteenth Amendment, p. 140	19

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Appellees.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Petitioner, Joseph Sica, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Two thereof, entered on February 13, 1953 [R. 77, Crim. No. 4942], dismissing the appeal of your petitioner from a judgment of the Superior Court of California, in and for the County of Los Angeles,

which order of said Superior Court denied a petition of your petitioner for an order setting aside a judgment of conviction and in the alternative for a Writ of Error *Coram Nobis,* and your petitioner seeks a review of the judgment of said District Court of Appeal denying application for an order to set aside the said judgment of said Superior Court and for a Writ of Error *Coram Nobis* [R. 110, Crim. No. 4942,], which order was made on April 1, 1953 [R. 162, Crim. No. 4942], and from a judgment of conviction pronounced by the Superior Court of the State of California, in and for the County of Los Angeles [R. 46, Crim. No. 4781] and affirmed on appeal by said District Court of Appeal [R. 852, Crim. No. 4781].

Opinions Below.

The opinion of the court below, District Court of Appeal of the State of California, in and for the Second Appellate District, Division Two, dismissing the appeal of your petitioner [R. 77, Crim. No. 4942] is reported in 116 Advance California Appellate Reports No. 1, at page 65 (253 P. 2d 75); the opinion of the District Court of Appeal affirming the judgment of the Superior Court of the State of California, in and for the County of Los Angeles [R. 852, Crim. No. 4781] is reported in 247 P. 2d 72; the opinion affirming the conviction of your petitioner in the Superior Court of the State of California, in and for the County of Los Angeles is found in 112 Cal. App. 2d 574.

A petition for a rehearing in the District Court of Appeal on the appeal from the judgment of the Superior Court of the State of California sustaining the conviction

of your petitioner [R. 872, Crim. No. 4781] was denied on August 21, 1952 (112 Advance California Appellate Reports No. 9, Minutes, page 1); a petition for a hearing in the Supreme Court of the State of California from the judgment dismissing the appeal of your petitioner [R. 882, Crim. No. 4781] was denied by said Supreme Court on September 4, 1952 (39 Advance California Reports No. 18, Minutes, p. 3) [R. 934, Crim. No. 4781].

A petition for hearing in the Supreme Court of the State of California and for transfer of the cause to that court after our petition for a writ of error *coram nobis* and to set aside the judgment of the Superior Court was denied by the District Court of Appeal, was filed with the Supreme Court of California and thereafter on April 30, 1953, by said court denied [R. 178, Crim. No. 4942] (40 Advance California Reports No. 22, Minutes, page 3).

Jurisdiction.

The judgment of the District Court of Appeal was entered February 13, 1953 [R. 77, Crim. No. 4942]; a petition for hearing in the Supreme Court of California was denied March 12, 1953 [R. 109, Crim. No. 4942] (Advance California Reports No. 15, Minutes, page 3). The order of the District Court of Appeal simply dismissed the petition for a Writ of Error *Coram Nobis* and denied the application for bail. The constitutional issues here presented were urged in the lower court. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended.

Questions Presented.

Section 1265 of the Penal Code of the State of California, so far as here material, provides "that if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error *coram nobis* shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal. When a judgment is affirmed by a district court of appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the district court of appeal."

Section 1237 of the Penal Code of California provides in what cases an appeal may be taken by the defendant. An appeal may be taken by the defendant (sub. 3) "From any order made after judgment, affecting the substantial rights of the party."

The questions presented:

First: Whether Section 1265 of the Penal Code, which requires a defendant after a judgment has been affirmed to proceed in the District Court of Appeal if he elects to set aside a judgment of the Superior Court, takes from the Superior Court of the State of California a power granted by the Constitution of the State of California conferring jurisdiction upon the said Superior Court in felony matters, and

Second: Whether said section denies to a defendant a right to be fully heard in the Superior Court, and

Third: Whether it takes from a defendant the right of appeal as set forth in Section 1237 of the Penal Code of California, subsection 3 thereof, and

Fourth: Whether the denial of a right to be heard in the Superior Court of the State of California in the first instance, and in the second instance, the right of appeal, and third, the right of a hearing in the District Court of Appeal pursuant to said Section 1265, does not deprive the petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved.

The statutory provisions involved here are:

1. Section 1265 of the Penal Code of California, and so far as here material, it provides:

> "that if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error *coram nobis* shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal. When a judgment is affirmed by a district court of appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the district court of appeal."

2. Section 1237 of the Penal Code of California which provides in what cases an appeal may be taken by the defendant. An appeal may be taken by the defendant (Sub. 3) "From any order made after judgment, affecting the substantial rights of the party."

Summary Statement of the Matters Involved.

The petitioner, Joseph Sica, by Information filed by the District Attorney of Los Angeles County, State of California, was charged with a number of defendants with conspiracy to violate Section 337-a of the Penal Code of the State of California (gaming). After a trial by jury, all of the defendants including your petitioner were convicted. An appeal to the District Court of Appeal followed, and the conviction was affirmed [R. 852, Crim. No. 4781] (247 P. 2d 72).

A petition for rehearing by that court was denied; a petition for hearing by the Supreme Court of California was denied. The petitioner contended at the trial that he was innocent, and took the stand in his own behalf and testified. None of the other defendants did so. The conviction was based almost entirely upon testimony given by police officers to the effect that they had observed a service station in Los Angeles and had seen various of the defendants, including your petitioner, in the service station; that dictaphones were installed in the service station and in a telephone booth adjoining the service station and numerous telephone calls were listened to and conversations in the service station over a period of some ten or twelve days. The police officers identified the various voices, including that of your petitioner. Only one of the police officers was at all familiar with the voice of your petitioner until the arrest of petitioner. All admitted that there was great similarity between the voice of your petitioner and his brother, Alfredo (Fred) Sica, a co-defendant. Your petitioner denied that it was his voice, except some conversations which were unrelated to gaming or bookmaking. Transcriptions of

the dictaphone records were played in court and your petitioner denied it was his voice and stated that it was that of his brother. After the conviction was affirmed and the remittitur filed with the Superior Court, your petitioner surrendered pursuant thereto, and commenced serving a term of one year in jail pursuant to the judgment, and immediately filed a petition to set aside the judgment or petition for a writ of error *coram nobis* [R. 110, Crim. No. 4942], setting forth that he was innocent, that it was not he who had done the talking, but that it was his brother. This petition to set aside the judgment was supported by an affidavit of his brother, Alfredo Garardo Sica [R. 127, Crim. No. 4942], and also by an affidavit of the petitioner's attorney, Russell E. Parsons [R. 121, Crim. No. 4942], to the effect that he had listened to the transcriptions, that in his opinion the voice attributed to Joseph Sica was not that of Joseph Sica, and that prior to the commencement of the trial he had asked the co-defendants and their attorneys for permission to call the co-defendants to the stand and have them testify to the truth and to the effect that Joseph Sica was not a part of the conspiracy and that it was not his voice discussing gaming matters, as attributed to him by the officers, but that it was in truth and in fact his brother, Fred Sica; that all of the defendants, while admitting the truth of the matter, had refused to testify and their attorneys had refused to permit them to testify. The peition of Joseph Sica, also filed in the Superior Court of Los Angeles County [R. 21, Crim. No. 4942], also recited that he had asked his brother and the co-defendants to testify in his behalf but that they had refused to do so.

The petition was denied by the Superior Court, and an appeal to the District Court of Appeal perfected; an opening brief was filed by petitioner, which was met by a motion to dismiss filed by the Attorney General, and after briefing the matter and argument, the District Court of Appeal dismissed the appeal [R. 77, Crim. 4942] (253 P. 2d 75). From the order of the District Court of Appeal dismissing the appeal a petition was lodged with the Supreme Court of California seeking a hearing and to have the cause transferred to it, the appropriate California procedure [R. 163, Crim. No. 4942]. This petition was denied on April 30, 1953 [R. 178, Crim. No. 4942] (40 A. C. Rep., No. 22, Minutes, p. 3).

Reasons Relied Upon for the Allowance of This Writ.

1. Section 1265 of the Penal Code of California, insofar as here material, has been set forth hereinbefore under the provision "Statutes Involved," and in effect it provides that when a judgment has been affirmed on appeal, no motion shall be made or proceeding in the nature of a writ of error *coram nobis* shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal, and that when a judgment is affirmed by a District Court of Appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the District Court of Appeal. In effect this section deprives the Superior Court of the State of California of jurisdiction to hear a motion to set aside the judgment. It is our contention that such a provision is unlawful. Our government is a system of checks and balances, consist-

ing of the executive, legislative and judicial. (*In re Duncan,* 139 U. S. 449; 35 L. Ed. 219).

Article VI of the Constitution of the State of California provides:

"ARTICLE VI—*Judicial Department*

Courts in Which Judicial Power Is Vested

"Sec. 1. The Judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, Superior Courts, and municipal courts as may be established in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county. (Amendment adopted November 4, 1924)."

It has been said:

"Where the Constitution fixes the jurisdiction of a court, that jurisdiction cannot be changed by the legislature without authority from the people in the form of a constitutional amendment. It follows that the provisions of the Section 1126 of the Code of Civil Procedure which attempts to give the Supreme Court original appellate jurisdiction over election contests cannot be given effect here as they violate the plain provisions of the Constitution."

McClintock v. Abel, 68 P. 2d 273, 276, 21 Cal. App. 2d 11.

"The jurisdiction of the Superior Courts is given by the constitution and cannot be taken away by the legislature even if they had attempted to do so . . ."

City of Tulare v. Hevren, et al., 126 Cal. 226, 228.

In *Tulare v. Hevren, supra,* the Court further said at page 230:

> "It was also intended that the laws for the protection of the citizens of the state and the protection of their property should be made uniform, consistent, and harmonious, that privileges given one should be enjoyed by all, and the burdens should be placed on all alike."

It has been said that while the legislature has the power to regulate it has not the power to take away or defeat the exercise of jurisdiction of Courts.

In re Jessup, 81 Cal. 408, 410, 22 Pac. 742.

It is well known, we respectfully urge, that Courts derive their jurisdiction from the Constitution and laws creating the Court.

De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345.

We contend that this is a denial of due process of law, for it was the trial court, the Superior Court, which by the Constitution of the State of California was given original jurisdiction, and it was to the trial court we were entitled to go to have this matter heard. We believe such a denial offends Federal due process.

See

Holden v. Hardy, 169 U. S. 366, 389;

Palko v. Connecticut, 302 U. S. 319, 327.

2. Section 1265 of the Penal Code of California, as amended, and set forth hereinabove, deprives your petitioner not only of the right to be heard in the Superior Court, but also the right to appeal from any unfavorable order made by said Superior Court, and the right of appeal is specifically guaranteed by Section 1237 of the Penal Code of the State of California subsection 3 thereof, which section provides in what cases an appeal may be taken by the defendant and specifically provides that an appeal may be taken from any order made after judgment affecting the substantial rights of the party.

3. Section 1265, as amended, provides that an application for the writ shall be made to the District Court of Appeal after affirmation of the judgment by said Court, but it makes no provision for a hearing or how the matter shall be heard, and in that regard is so uncertain that, in effect it denies to anyone, and your petitioner in particular, and did deny to your petitioner, a hearing, for none was had. We filed the petition, supported by affidavits, and it was almost summarily denied. No opposition thereto was filed by the State of California, and without an opportunity to be heard, without a hearing, our petition was summarily denied. This surely offends due process.

See

Palko v. Connecticut, 302 U. S. 319, 327.

Conclusions.

Wherefore, your petitioner prays that this Court issue a writ of certiorari to the District Court of Appeal of the State of California, in and for the Second Appellate District, Division Two thereof, and that the judgment of said Court be reversed, and furthermore that the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, denying to this petitioner relief under his petition to set aside the judgment and for a writ of error *coram nobis,* be reversed, to the end that this petitioner may have a full and fair trial in the said Superior Court where he may present the evidence of his co-defendants who are now ready and willing to tell the truth, and which evidence was not, through any fault of your petitioner, available at the time of the trial, and for such other and further relief as will meet the ends of justice.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioner, Joseph Sica.

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THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION TWO THEREOF,

Appellees.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

For a statement showing the disposition of the instant case by the courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, and a statement of the case, reference is here made to the foregoing Petition for Writ of Certiorari in the interests of brevity, and we respectfully ask the Court to consider the same.

Specifications of Error.

The judgment of the courts below should be reversed for the following reasons:

I.

Whether Section 1265 of the Penal Code, which requires a defendant after a judgment has been affirmed to proceed in the District Court of Appeal if he elects to set aside a judgment of the Superior Court, takes from the Superior Court of the State of California a power granted by the Constitution of the State of California conferring jurisdiction upon the said Superior Court in felony matters.

II.

Whether said Section 1265 of the Penal Code denies to a defendant a right to be fully heard in the Superior Court.

III.

Whether said Section 1265 of the Penal Code takes from a defendant the right of appeal as set forth in Section 1237 of the Penal Code of California, subsection 3 thereof.

IV.

Whether the denial of a right to be heard in the Superior Court of the State of California in the first instance, and in the second instance, the right of appeal, and third, the right of a hearing in the District Court of Appeal pursuant to said Section 1265, does not deprive the petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

Section 1265 of the Penal Code of California and the District Court of Appeal's decision granting the motion to dismiss the appeal of your petitioner, took from the petitioner the right to be heard in the Superior Court in the first instance. We contend that the Superior Court of the State of California, by constitutional provision, is the court within which this matter should be heard. We brought an appropriate petition, for the evidence was before that court. The court denied our position. We then took an appeal and the appeal was dismissed. We were denied Federal due process, for we were, in effect, denied the right of a full and fair hearing. The Superior Court below erred in not granting our petition, for the petition and the supporting affidavits and testimony overwhelmingly showed that Joseph Sica was innocent; that the co-defendants were then willing to testify in his behalf and to that effect, and the evidence further showed that he could not have compelled any of his co-defendants to testify in his own behalf by reason of the Fifth Amendment to the Constitution of the United States, the provision against self-incrimination, and the affidavit shows that the co-defendants had been requested to testify, that their attorneys had been requested to permit them to do so, but without avail.

In the petition we have recited the constitutional provision of the State of California vesting jurisdiction, and supporting cases, and respectfully direct the Court's attention thereto in the interest of brevity, but permit us to say that it has ever been held in California that the jurisdiction of courts of equity having been given to the

Superior Court by the Constitution, it cannot be taken away by statute.

Gay v. Thorpe, 1 Cal. App. 312, 314, 82 Pac. 221.

A court which has been vested with jurisdiction has all the powers necessary to its exercise.

A pertinent discussion of the source of jurisdiction of California courts and their inherent power to the exercise of all necessary acts to the complete exercise of their jurisdiction, is fully discussed in the oft quoted case of *In re Albori,* 95 Cal. App. 42, 272 Pac. 321, quoting cases. See also *Pacific Telephone Company v. Eshleman,* 166 Cal. 640, 137 Pac. 1119, 1138.

The decision of the courts below in invoking Section 1265 of the Penal Code of California completely disregarded Section 1237 of the Penal Code of California, which clearly provides for the procedure we have adopted here, for it provides in subsection 3 thereof, that an appeal may be taken by the defendant "from any order made after judgment affecting the substantial rights of the party." The right of appeal is an inviolate right, we assert, and has been recognized, even in California, as a part of due process of law pursuant to the Fourteenth Amendment to the Constitution of the United States, and was so recognized by this Court only recently. (*Edelman v. California,* 97 U. S. L. Ed. 227 at 232.)

After the appeal from the order of the Superior Court denying our motion to set aside the judgment, and after a denial by the Supreme Court of California for a petition to be heard, then a petition pursuant to Section 1265 was filed by your petitioner in the District Court of Appeal, with supporting affidavits [R. 110, 121, 127, 156, Crim. 4942]. This petition was summarily denied

without a hearing [R. 162, Crim. 4942]. This certainly was a denial of Federal due process. As was said by this Court in the case of *Railroad Commission v. Pacific Gas & Electric Company,* 302 U. S. 388, 393:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement."

It has also been said that this right to a fair hearing upon notice has been deemed by the United States Supreme Court to constitute "an inexorable safeguard."

Morgan v. United States, 304 U. S. 1, 15.

Brannon in his work *Fourteenth Amendment* at page 140 recites the general definition of "due process" as enunciated by Daniel Webster, in the famous *Dartmouth College* case, 4 Wheat. 581, that:

> "By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of general rules that govern society."

See also:

Powell v. Alabama, 287 U. S. 45, 68, 77 L. Ed. 158.

The statute complained of, Section 1265, is so uncertain and indefinite that it does not even provide for the manner in which a hearing might be accorded to a petitioner, and for that reason alone the statute should fall by reason of its uncertainty and indefiniteness. It merely

says the application for the writ shall be made to the District Court of Appeal. No further steps are provided for, and in this case we see the result of such an indefinite statute. Our petition was summarily dismissed —why or how we do not know.

The petition to set aside the judgment or for the so-called writ of error *coram nobis* was the only avenue left open to petitioner by which he might call to the attention of the court the fact that he had been unjustly convicted and that evidence that he could not have produced at the time of the trial was now available. For a discussion of this subject, we respectfully direct the Court's attention to the case of *People v. Superior Court,* 28 Cal. App. 2d 442, 82 P. 2d 718, 719, where the applicability of this motion is fully discussed.

> "The place of the so-called writ of error *coram nobis* in the jurisprudence of this state has been clarified by several recent decisions. Said writ was originally a common-law remedy which was used under certain exceptional circumstances. The nature of the writ and its survival in modified form in this state is exhaustively discussed in *People v. Reid,* 195 Cal. 249, 232 P. 457, 36 A. L. R. 1433. The court there quoted from 5 *Encyclopedia of Pleading and Practice,* page 27, at page 255, 232 Pac. at page 459 of the opinion, where it is said, 'The office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, such as * * * a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the ren-

dition and entry of the judgment questioned.' It may be stated here that petitioner does not question the sufficiency of the allegations contained in the petition filed in the police court to bring the cause within the rule stated.

(1, 2) The use of said writ is limited in this state to those situations where the right to appeal and the right to move for a new trial as provided by statute do not afford a remedy (*People v. Reid, supra; People v. Superior Court,* 4 Cal. 2d 136, 47 P. 2d 724); and it has been held that 'in the practice in this state a petition for a writ of error, *coram nobis,* is nothing more nor less than a motion to vacate.' *People v. Vernon,* 9 Cal. App. 2d 138, 143, 49 P. 2d 326, 328. See, also, *People v. Perez,* 9 Cal. App. 265, 98 P. 870. The court further said in the case of *People v. Vernon, supra,* at page 141, 49 P. 2d at page 327, 'It therefore results that, although the relief sought be of the nature of that included within and formerly afforded by a writ of error, *coram nobis,* because of its comparatively ancient origin and its correspondingly relatively recent disuse, the mystery and the magic, which now apparently attach to such an appellation as applied to the proposed remedy are completely dispelled and obliterated by designating such remedy by the more simple and appropriate name of a motion to vacate the judgment. The practical result of such practice in effect and substance demonstrates that the relief that may be administered by the one form of procedure is identical with that in the other.' We therefore believe that the defendant's petition as filed in the police court should be treated as a motion to vacate the judgment previously entered.

(3) "Our search has not brought to our attention any case directly holding that a police court

may entertain such a motion under the precise circumstances before us, but we are of the opinion that a police court has jurisdiction for that purpose. The authorities do not indicate that such jurisdiction is vested only in courts of record. In *People v. Campos,* 3 Cal. 2d 15, 43 P. 2d 274, the court said at page 17, 43 P. 2d at page 274, 'It is settled in this state that where on account of duress, fraud or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is reasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before plea of any kind was entered.' See, also, *People v. Schwarz,* 201 Cal. 309, 257 P. 71; *In re Sargen,* 135 Cal App. 402, 27 P. 2d 407. And in *William v. California Milk Producers Association,* 136 Cal. App. 172, 28 P. 2d 59, it was held that a police court has the inherent power to vacate a judgment previously rendered by it under certain exceptional circumstances. On page 175, 28 P. 2d on page 60 the court there said, 'Under such circumstances the statutory remedies have no application, and a procedure based upon the common law has developed to meet the lack of a statutory remedy. This procedure has taken the form of a motion properly supported. *People v. Mooney,* 178 Cal. 525, 174 P. 325; *People v. Perez,* 9 Cal. App. 265, 98 P. 870.'

(4) "We conclude that the defendant's petition filed in the police court was in substance and effect a motion to vacate the judgment previously entered by said court; that said court had jurisdiction to enter-

tain said motion; that the order denying said motion was an appealable order (Pen. Code, Sec. 1466, as amended by St. 1935, p. 2146); and that the respondent court had jurisdiction to 'reverse, affirm or modify the * * * order appealed from.' Pen. Code, Sec 1469, as amended by St. 1935, p. 2146. In view of these conclusions, it becomes unnecessary for us to determine whether mandamus would have been an appropriate remedy in the event that the trial court had exceeded its jurisdiction.

"The alternative writ is discharged and the peremptory writ is denied."

Conclusion.

In the light of all of these circumstances, it appears that in the instant matter the petitioner has been deprived of Federal due process by judgments of the State court. This Court should grant certiorari and order the judgment below reversed, to the end that full justice be done to this petitioner.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioner, Joseph Sica.